IN THE SUPREME COURT OF ONTARIO

COURT OF APPEAL

Houlden, Wilson and Weatherston JJ.A.

B E T W E E N:	)	
	)	
ONTARIO HUMAN RIGHTS COMMISSION and BRETT BANNERMAN	)	John Sopinka, Q.C. and John A.M. Judge, for the appellants
Appellants	)	
	)	
- and -	)	
	)	
ONTARIO RURAL SOFTBALL ASSOCIATION	)	William L. Hewson, for the respondent
Respondent	)	
	)	Appeal heard: May 24, 1979

WILSON J.A.:

The main issue raised on this appeal is whether the refusal of the Ontario Rural Softball Association (O.R.S.A.) to permit Debbie Bazso, a nine-year-old girl, to participate in the baseball play-offs organized by O.R.S.A. as a member of a boys' team violated s. 2 of The Ontario Human Rights Code.

The matter was initiated by a Complaint of Discrimination against O.R.S.A. made under the Code by Mr. Brett Bannerman, Coach and Manager of the Waterford Squirt All-Star softball team who had conducted the try-outs for the O.R.S.A. play-offs. Mr. Bannerman was anxious to include Debbie on the team because she was his star player. She had played on the local Waterford team and this team had competed in the Erie Minor Softball League, no objection having been taken to her participation in boys' softball up to this level. However, when Mr. Bannerman applied to register

Debbie with O.R.S.A. with a view to the play-offs he was advised by Mr. Harnett, the Secretary of O.R.S.A., that Debbie could not play because girls were not allowed to play on boys' teams in O.R.S.A. or in any other organized league which is a member of the Ontario Softball Council.

In the same letter Mr. Harnett advised Mr. Bannerman that he had failed to send a certificate of registration for Debbie or the required fifty cent fee. The certificate and accompanying payment was forwarded on receipt of this letter but it did not make the July 1st, 1969 deadline prescribed by the O.R.S.A. by-laws. This and other technical deficiencies in Debbie's application were dealt with at length in the reasons for judgment of Mr. Lederman, Chairman of the Board of Inquiry which looked into the Complaint, and I do not propose to deal with them here other than to say that I am in complete agreement with him that they were not the basis on which Debbie Bazso's application was rejected. Her application was rejected solely because of her sex. I propose therefore to confine myself to the main issue.

Section 2 of The Ontario Human Rights Code provides as follows:

> 2.-(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,
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> (a) deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or
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> (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted,
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> because of the race, creed, colour, sex, marital status, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons.

The Board of Inquiry found that the section had been violated by O.R.S.A. and made the following order:

> IT IS ORDERED that the Respondent comply with s. 2(1)(a) and (b) of The Ontario Human Rights Code and cease providing sex-segregated divisional softball playoffs for children aged 11 years and under, and henceforth provide integrated playoff competition for both boys and girls within this age group.

An appeal was taken by O.R.S.A. to the Divisional Court which held that no violation of the section had taken place and set aside the order of the Board. It will be helpful to summarize the reasoning underlying both these decisions.

Both tribunals agreed that the issue was primarily one of statutory interpretation. Was O.R.S.A. providing "services or facilities" within the meaning of the section and, if so, was it

providing them "in any place to which the public is customarily admitted"?

To find out what "services or facilities" O.R.S.A. was providing the Board looked to its Objects as set out in Article III of its Constitution:

> (a) To foster and organize Softball and community spirit in Rural Districts.
>
> (b) To Provide softball for Rural Areas, also institute and regulate competition for O.R.S.A.
>
> (c) As one of the members of the Ontario Softball Council, we help make softball available and competitive for communities in rural areas.

It concluded that O.R.S.A. was providing "an organized means by which boys' teams and girls' teams from different rural centres in Ontario are able to separately compete in playoffs for various trophies and championships". It then went on to find that these services were being provided by O.R.S.A. in a "place to which the public is customarily admitted". The "place", the Board concluded, was the various ballfields on which the play-off games are played and, although access to the services was limited by requirements such as age and population size with respect to various Divisions, the services O.R.S.A. was providing were available to the public at large meeting these requirements. Therefore, concluded the Board, the services were being provided in a "place to which the public was customarily admitted".

The Divisional Court agreed that O.R.S.A. was providing "services or facilities" within the meaning of s. 2. It applied its own decision made earlier the same day on the appeal from the Commissioner on the Complaint of Discrimination made against the Ontario Minor Hockey Association. In that case Gail Cummings, a ten-year-old girl, was refused registration by the O.M.H.A. because of her sex and barred from playing on the Huntsville All-Star team in the hockey play-offs. The main issue on both appeals was accordingly the same. The Divisional Court on that appeal concluded that the words "services or facilities" should be liberally construed and should not be confined to services or facilities usually provided by restaurants, public libraries, arenas, parks, etc. However, Evans, C.J.H.C., delivering the judgment of the Court, then said:

> On the basis of my interpretation of s. 2(1)(a) of the Code, I have concluded that the prohibition is against discrimination in the provision of accommodation, services or facilities available to the public in any place to which the public is customarily admitted. The Code does not seek to regulate organizations and associations of a private nature, although unquestionably many of them may be discriminatory in the sense that they refuse membership because of race, creed or the other factors referred to in s. 2. What it does seek is the prevention of discrimination because of certain enumerated factors to facilities open to all in those places to which the public have customarily a right to admission. If the accommodation, services or facilities are not available to the public in the sense that they are not open to the public generally, although provided in a place to which the public is customarily admitted, then they fall outside the ambit of the Code.

The learned Chief Justice then went on to discuss whether or not O.M.H.A.'s services were available to the public and concluded that they were not. He further stated:

> I am not prepared to hold that the Legislature in enacting s. 2 of The Ontario Human Rights Code had the intention to impinge on the right of citizens to form athletic associations which are not basically public or to restrict the freedom of choice in personal associations. The appellant was providing a service or a facility which was available, that is, capable of being used or taken advantage of by boys. The limitation on availability of the facilities provided by O.M.H.A. does not become discriminative because some of the activities supervised and organized by the association are carried out in a hockey arena which clearly is a place to which the public is customarily admitted. In this case the place where the activity is carried on is not the dominant factor; it is the service or facility available which governs.
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> [My emphasis]

With respect, I do not think it was open to the learned Chief Justice to read words into the section. The legislature did not limit the "accommodation, services or facilities" covered by the section to those which are "available to the public". Availability to the public is relevant under the section only with regard to the place in which the services or facilities are being provided. I think therefore that the learned Chief Justice may have erred when he concluded that the place where the activity is carried on is not the dominant factor but rather "the service or facility available".

I agree with the submission of counsel for the appellant that the phrase "available in any place to which the public is customarily admitted" qualifies the "accommodation, services or facilities" covered by the section and that the public element

is referable therefore to the place and not to the accommodation, services or facilities. In this respect s. 2 of The Ontario Human Rights Code is to be contrasted with s. 3 of The Human Rights Code of British Columbia which was in issue in a judgment of the Supreme Court of Canada released May 22, 1979 and not yet reported, Gay Alliance Toward Equality v. The Vancouver Sun. Section 3(1) of the British Columbia Code reads as follows:

> 3.--(1) No person shall
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> (a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
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> (b) discriminate against any person or class of persons with respect to any accommodation, service or facility customarily available to the public,
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> unless reasonable cause exists for such denial or discrimination.
>
> (2) For the purposes of subsection (1),
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> (a) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
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> (b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance. [My emphasis]

The discrimination alleged against the Sun in that case was that it had refused to publish in its classified advertising section the Gay Alliance's advertisement promoting the sale of subscriptions to "Gay Tide", a magazine of the homosexual community.

It had simply advised the Alliance by letter that the advertisement was "not acceptable for publication in this newspaper". Mr. Justice Martland, delivering the reasons of the majority, said:

> In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, the Sun had adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propagates the views of the Alliance. Such refusal was not based upon any personal characteristic of the person seeking to place that advertisement, but upon the content of the advertisement itself.
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> Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself. What s. 3 does is to provide that a service which is offered to the public is to be available to all persons seeking to use it and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.
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> [My emphasis]

It seems to me that what the learned Supreme Court Justice was saying was that the only advertising service offered by the Sun which could be said to be "customarily available to the public" was not a wide open advertising service but an advertising service controlled by the editorial policy of the newspaper. The editorial

policy circumscribed the scope of the service which the Sun was offering to the public and, since s. 3 of the Code does not purport to dictate the nature and scope of a service which must be offered to the public, the section did not require the Sun to publish advertisements which were contrary to its editorial policy.

The Chief Justice wrote dissenting reasons. He summed up the main argument of counsel before the Supreme Court as follows:

> The gist of the argument was that the Human Rights Code proscribes discrimination only on the basis of an attribute or characteristic of a person or class of persons; it does not prohibit all unreasonable denials or discriminations and, hence, as in this case, a denial or discrimination based on a newspaper policy or even on "some personal quirk" (to use counsel's words in his supplementary factum) of the newspaper publisher would be outside the scope of the statute. This is an untenable submission, however beguiling it may seem at first blush. It evades the very questions which arise under s. 3 or under the comparable s. 8 which deals with discrimination in employment.

The learned Chief Justice then went on to point out that s. 3 does not deal with all services or facilities but only with those services or facilities which are "customarily available to the public". Although it had been argued before the Board that the classified advertising services provided by the Sun were not services which were customarily available to the public, no issue was made of this either in the British Columbia Court of Appeal or in the Supreme Court.

Accordingly, the Chief Justice was of the view that, the Board of Inquiry having found as a fact that the violation of s. 3 was based on a bias against homosexuals and homosexuality and that this did not constitute "reasonable cause" under the section, these findings of fact were not subject to review by the British Columbia Court of Appeal.

Mr. Justice Dickson, while concurring with the Chief Justice, wrote his own reasons. He distinguished the unique structure of the British Columbia Code from Codes such as that adopted in Ontario which do not contain the "reasonable cause" concept but simply list the proscribed forms of discrimination. He pointed out that the "reasonable cause" concept permits in respect of some activities a balancing of competing interests. In respect of activities such as the purchase or rental of living quarters, only the proscribed forms of discrimination which are stated not to constitute "reasonable cause" can supprot a complaint. In the case of activities such as the provision of accommodation, services or facilities, a complaint can be founded on a wider range of forms of discrimination but in such a case "reasonable cause" may be shown in the form of the interest sought to be advanced by the person alleged to be in violation of the section. No such balancing of interests, Mr. Justice Dickson points out, can take place under the Ontario type of Code. Quoting from the reasons of the learned Justice:

> In the British Columbia Code, a somewhat different approach is taken. Certain classifications are automatically deemed "unreasonable", whatever the interest involved. Then there are certain interests which are defined to be fundamental and call for a broader standard of review. But, once one moves beyond the proscribed forms of discrimination in these areas of activity, the test of "reasonable cause" indicates a more restrained standard of review and a means of balancing the competing interests involved. In the context of this more restrained review, a board of inquiry must look to the classification adopted by the person whose actions are challenged, to the interest which that person seeks to forward as opposed to that of the complainant and to the relation between the classification adopted and the interest put forward.
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> [My emphasis]

It is of interest to note that Mr. Justice Martland in delivering the reasons of the majority, discussed the meaning of the words "accommodation", "service" and "facility" as used in the British Columbia section. He said:

> In my opinion the general purpose of s. 3 was to prevent discrimination against individuals or groups of individuals in respect of the provision of certain things available generally to the public. The items dealt with are similar to those covered by legislation in the United States, both federal and state. "Accommodation" refers to such matters as accommodation in hotels, inns and motels. "Service" refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. "Facility" refers to such matters as public parks and recreational facilities. These are all items "customarily available to the public". It is matters such as these which have been dealt with in American case law on the subject of civil rights.
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> [My emphasis]

It seems to me that despite the difference in wording in the British Columbia and Ontario sections a number of the observations made by the learned Supreme Court Justices in the Gay Alliance case have to be considered in the context of this appeal.

Perhaps of paramount importance is the question whether the illustrations given by Martland J. as to the type of services and facilities covered by s. 3 of the British Columbia Code are the same type of services and facilities as are covered by s. 2 of the Ontario Code. Or are his illustrations premised on the fact that the services and facilities caught by s. 3 of the British Columbia Code are limited to those "customarily available to the public"? In other words, is the Gay Alliance case distinguishable as far as the generic content of Mr. Justice Martland's illustrations are concerned on the basis of the different wording in the sections?

It seems to me that, while the illustrations given by the learned Justice are the accommodation, services and facilities which the anti-discrimination legislation was initially designed to ensure would be available to all, the case itself illustrates a totally different kind of service, namely classified advertising in a newspaper, which was found to be within the scope of s. 3 of the British Columbia Code as a service "customarily available to the public". I do not think therefore that it would be appropriate to refine too much on Mr. Justice Martland's illustrations. I think the learned Justice refers to them because of their historic significance in the development of the law in this area. I do not think he should be taken to have suggested that the categories of accommodation, services and facilities covered by the British Columbia section are closed.

I have concluded that s. 2 of The Ontario Human Rights Code by its terms covers any and all "accommodation, services or facilities" subject to the one qualification that they be "available in any place to which the public is customarily admitted". The Court, it seems to me, is directed under our Code to focus on the public nature of the place and not on the public nature of the services or facilities. No attempt has been made to qualify the services other than by reference to the place where they are being made available. The effect of our section, in other words, appears to be to ban discrimination in public places. If one refers back, for instance, to Mr. Justice Martland's illustrations of "service" they would clearly all be covered by s. 2 of our Code since restaurants, bars etc. are places to which the public is customarily admitted. However, our section may be wider in its impact and extend to services which, although not themselves customarily available to the public, are being made available in a place to which the public is customarily admitted.

It seems to me that, whether one views the services of O.R.S.A. as being provided in the park or on the ballfield in the park, and much argument was directed by counsel to this distinction, the services are being made available in a place to which the public is customarily admitted. It is a portion of the park which is being used for ball games and, inasmuch as the public park is the site of the activity, I think the services are being made available in a place to which the public is customarily

admitted. I cannot accede to the argument that, while the play-offs are in progress, no member of the public has access to the ballfield and therefore it is not a place to which the public is customarily admitted. I do not think the legislature, in putting the emphasis on the location of the activity, could have intended that the public aspect of the place where it was going on would be eliminated every time an activity, discriminatory or otherwise, was being conducted there. This would surely be to defeat the very object of the section.

Another aspect of the Gay Alliance decision which may have relevance on this appeal is the conclusion reached by Mr. Justice Martland that the Code does not purport to dictate the nature and scope of a service which must be offered to the public. The Sun, he held, was free to limit the scope of its advertising service by its own editorial policy. The only requirement was that, whatever the scope of service the Sun decided to offer, it must make it available to all who wished to use it unless it had reasonable cause for withholding it. This approach clearly did not find favour with the dissenting Justices. It is, however, very similar to a submission of counsel on the instant appeal which was that the Code does not dictate the scope of the service O.R.S.A. must provide. O.R.S.A. makes that decision and, having decided to provide girls' softball and boys' softball, it cannot be required by the Code to provide integrated softball instead.

The submission, it seems to me, if accepted, could also have the effect of defeating the object of the legislation. Is it open to O.R.S.A. to say: "we provide softball for whites and softball for blacks and that is the scope of the service we have decided to provide"? I do not think so. I do not believe that the services provided in a public place can be circumscribed on the basis of the prohibited criteria. Certainly, any organization can determine what services it is going to provide and to whom, but I think what the legislature is saying in s. 2 is: if you are going to provide them in a place to which the public is customarily admitted, then you cannot exclude anyone from them solely on the basis of race, creed, colour etc. I say "solely" because I do not believe that an organization or club which has a legitimate basis of selection for participation or membership apart from the prohibited criteria will be in violation of s. 2 if it denies participation or membership to an applicant on legitimate criteria even if the organization is conducting its activities in a public place. No violation of s. 2 takes place unless the service is denied because of the prohibited criteria. Accordingly, the Code does not in any way inhibit the activities of private clubs or organizations which attach qualifications to membership involving a bona fide process of selection: see Charter and Others v. Race Relations Board, [1973] 1 All E.R. 512. It will be a matter for the Commission on the hearing of a complaint to determine the true basis on which the services have been denied.

I may say that a study of the Constitution and By-laws of O.R.S.A. fails to disclose any basis of selection for participation in the play-offs (other than age, skill at the game etc.) which would put O.R.S.A. in the "private club" category nor was any put forward in argument on the appeal. Indeed, there is no suggestion that Debbie Bazso did not meet all the other tests of eligibility for the play-offs. She was refused registration simply because she was a girl. Her case seems to me therefore to be on exactly the same footing under the section as the case of a boy denied registration by O.R.S.A. because he is black.

A great deal of evidence was presented to the Commission on the subject of the physiological differences between males and females in terms of their ability to compete with each other in sports at different ages. The conclusion to be drawn from this evidence appears to be that in the 9 to 13 age range girls possess greater skeletal maturity than boys and can therefore more than hold their own in competition, but that from age 14 up the muscle development in boys would give them a decided athletic advantage. Accordingly, while meaningful competition could exist in integrated sports at the younger age levels, this would not be so beyond age 14. This did not mean, of course, that there would not be the odd exception, a boy or girl whose physiological development would equip him or her to compete in integrated sports at his or her age level.

It was also put to the Commissioner and to the Court that, if s. 2 of the Code requires a girl aged 9 to be allowed to play on a boy's team, then it must also require a boy aged 18 to be allowed to play on a girl's team, and this, indeed, would seem to follow.

Arguments were also made that at the higher age levels, where boys might be expected to dominate the game because of their superior physical strength, there would be an enhanced risk of injury to the female players. Girls' participation in the sport might therefore be reduced instead of encouraged if sex-segregated athletics were held to be illegal.

It seems to me that all of these submissions are directed to the question whether or not athletics should be covered by s. 2 of the Code rather than to whether or not they are covered by s. 2. Whether or not they should be covered by the Code is, in my view, a policy matter for the legislature. There is nothing in s. 2 or in the Code to warrant a restrictive interpretation of "services or facilities" so as to exclude the kind of services or facilities provided by O.R.S.A.. Nor, as Mr. Justice Dickson was at pains to point out in the Gay Alliance case, do we have that "reasonable cause" concept in our Code which might permit a weighing of competing interests in a case such as this where the enforcement of the absolute prohibition may be a "mixed blessing" for the sport.

It was pointed out to us by counsel for the Commission that the Sex Discrimination Act, 1975, 23-24 Eliz. II c. 65, of England, contains an exception for sports. Section 44 of that Act reads as follows:

> 44. Nothing in Part II to IV shall, in relation to any sport, game or other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man, render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex.

The Ontario legislature has not seen fit to make such an exception and I do not think it would be appropriate for the Courts to do so. No rule of statutory interpretation would, in my view, permit us to exclude sports programs and facilities provided in public parks and arenas from the ambit of the Code so as to permit discrimination in such programs and facilities. Indeed, as the Divisional Court pointed out, the Courts are required to construe the language of the section liberally so as to give effect to the public policy in favour of equality of rights recited in the Preamble. Chief Justice Evans, referring to the approach taken by the Commissioner on the complaint against the O.M.H.A., said:

> I am in agreement with her conclusion that the words "services and facilities" should not be read ejusdem generis with the term "accommodation". I am satisfied that they should not be given a narrow construction which would limit them to "services or facilities" usually provided by restaurants, public libraries, theatres, dance halls, arenas and parks, to mention only a few.

It was forcefully urged upon the Court that the Code was intended merely to codify the law as expressed in the statutes which it replaced, namely The Fair Employment Practices Act, 1951, S.O. 1951 c. 24, The Female Employees' Fair Remuneration Act, 1951, S.O. 1951 c. 26, The Fair Accommodation Practices Act, 1954, S.O. 1954 c. 28 and The Ontario Anti-Discrimination Commission Act, 1958, S.O. 1958 c. 70 and that none of these statutes had any application to athletics. I think this might have been a persuasive submission but for the recital in the Preamble which reads:

> And Whereas it is desirable to enact a measure to codify and extend such enactments and to simplify their administration; [my emphasis]

This recital by its very terms indicates that the legislature intended to extend the law beyond those areas covered by existing anti-discrimination legislation. Moreover, it is noted that The Fair Accommodation Practices Act, 1951 from which s. 2 of The Ontario Human Rights Code is derived had as its object the banning of discrimination in public places. The Preamble to that Act reads:

> WHEREAS it is public policy in Ontario that places to which the public is customarily admitted be open to all without regard to race, creed, colour, nationality, ancestry or place of origin; whereas it is desirable to enact a measure to promote observance of this principle; and whereas to do so is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;....

I do not know whether any complaint was ever laid under the earlier statute with respect to discrimination in sporting events

held in public places. Certainly none was referred to us. The fact is, however, that when one goes back to the earliest anti-discrimination legislation in Canada, it becomes clear that it was intended to reflect and bolster the principle of the antecedent case law that people were free to discriminate in private places but not in places which were "held out to the public for common use without reservation or limitation" (Mr. Justice O'Halloran dissenting in Rogers v. Clarence Hotel Co. Ltd., [1940] 3 D.L.R. 585 at p. 592). The evil aimed at, in other words, was discrimination in public places.

It was urged upon us by counsel for the Association that the legislature did not have amateur sport in mind when it added "sex" to the list of prohibited criteria in the section and that the Court should therefore construe the section so as to make it inapplicable to amateur sport. This, it is said, would be a legitimate exercise of the Court's power to construe statutes so as to give effect to the intention of the legislature. I am sympathetic to this general approach to judicial construction, but I am not persuaded that the intention of the legislature would be effected by taking amateur sport out of the operation of s. 2 having regard to the fact that discrimination on any of the prohibited criteria would then be outside the range of the section. It seems to me that if the legislature intends amateur sport to be excluded from the ban on discrimination on grounds of sex, the appropriate course for it to follow is to enact the kind of exception which was enacted in the United Kingdom. I do not see

how this narrow result can be achieved through the technique of judicial construction and I am not persuaded that the wider result which could be achieved by this route would be giving effect to the intention of the legislature.

Finally, a word must be said on the submission of counsel for the respondent that subsection (2) of s. 2 applies to take segregated softball out of the operation of subsection (1). The Board found as a fact that the "public decency" criterion did not apply to the O.R.S.A. play-offs for children under 11 years of age since the children invariably changed at home and were driven to and from their homes in their baseball attire. I do not think that finding can be interfered with on appeal.

I would accordingly allow the appeal, set aside the order of the Divisional Court and reinstate the order of the Board of Inquiry. I would award no costs of the appeal.

Bertha Wilson J.A.

/fs

WEATHERSTON, J.A.

The Ontario Rural Softball Association (O.R.S.A.) is an association of rural softball leagues. Its objects are stated in its Constitution to be:

> (a) To foster and organize Softball and community spirit in Rural Districts.
>
> (b) To Provide softball for Rural Areas, also institute and regulate competition for O.R.S.A.
>
> (c) As one of the members of the Ontario Softball Council, we help make softball available and competitive for communities in rural areas.

O.R.S.A. has rules which must be adhered to if a team in a member league is to participate in the play-offs, but it does not otherwise control the teams or the leagues in which they play. Essentially it provides an organizational structure within which teams may compete for the championship and trophy in one of 36 series, each series depending on the size of the municipality from which the teams come and the age of the team players. Twelve series are described in the Constitution under the heading: "Ladies Series".

Debbie Bazso played on a boys' team from Waterford. O.R.S.A. refused her a playing certificate and she was therefore not eligible to play for her team and because she did play her team was disqualified.

The question is whether, by refusing her a playing certificate and thereby denying her an opportunity to play for

a boys' team, O.R.S.A. was in breach of s. 2 of The Ontario Human Rights Code, R.S.O. 1970, c. 318, which provides:

> 2.(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,
>
> (a) deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or
>
> (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted,
>
> because of the race, creed, colour, sex, marital status, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons.
>
> (2) Subsection 1 does not apply to prevent the barring of any person because of the sex of such person from any accommodation, services or facilities upon the ground of public decency.

This section is one of several in the Code which seek to govern social behaviour in accordance with modern notions of human rights by giving effect to the policy in Ontario (which the Code recites in its preamble) that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin. Because it is intended to give effect to public policy, the Code should not be interpreted in a narrow and pedantic way; on the other hand it should not be given such a broad interpretation as to offend common sense. It should be so construed that its application to a given set of circumstances should not depend on the tolerance of the enforcement officials (as was suggested by counsel) or the good sense of all members of the public.

Personal services made available in a public place to members of one's own family would probably come within the literal terms of section 2, but are surely not within its purview. So too, it would seem, on a first reading of section 2 that it is an offence to deny a girl the right to join a boys' choir. But it is not necessary, in order to give effect to the stated public policy, that every word in section 2 should be read in the widest possible sense.

The Code differs from most other statutes which have a similar purpose in that it refers to accommodation, services or facilities "available in any place to which the public is customarily admitted", instead of to accommodation, services and facilities "which are available to the public"; that is, the place where the services are made available is described rather than the recipient of the services. While it is important that this difference be kept in mind, I believe that assistance may be obtained from the cases decided under those other statutes.

In Charter and Others v. Race Relations Board, [1973] A.C. 868, the House of Lords was concerned with the interpretation of a section of the Race Relations Act, 1968, c. 71 s. 2(1) (U.K.) which provided:

> 2(1) It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public....

The majority of the House held that a club, being essentially a private association of individuals, fell outside the scope of that section, provided the club's rules concerning the election of members made provision for a genuine process of selection and those rules were complied with. Such a club, in providing facilities or services to members, was not providing them to a "section of the public" within the section. Lord Morris of Borth-y-Gest dissented, but he said this, which I think is pertinent to the present case, at pp. 895-896:

> " It is I think to be remembered throughout that the Acts only make discrimination unlawful if it is on racial grounds. I suppose that practically every organisation or institution or club makes a practice of, or is under a necessity of, discriminating. Any selective process inevitably involves making a distinction between one person and another. That is what discrimination is. But the Acts only forbid one variety of selection or discrimination. A school or college or a university may have a rule that only someone who has passed some particular examination will be admitted. There will be a differentiation between the intelligent and the dullard. The Acts do not condemn such selection or differentiation. An organisation may be confined to those who carry on some particular trade or business or profession or occupation. The Acts do not condemn such differentiation or discrimination. A club may say that only those skilled in a particular sport may join or only those who owe allegiance to a particular political party: or only those who share the same religious faith: or only those who are under or over a certain age: or only those who will pay a certain amount of money. Discrimination on any of those or similar lines is not made unlawful. A club may say that out of those who apply to join only those will be selected who are considered by the committee to have qualities of personal acceptability. The Acts do not make such discrimination unlawful. What the Acts do say is that, other things being equal, a man is not to be ruled out only because of the colour of his skin. As between one person and others a person is not to be treated less favourably than the others on the ground of his colour or of his race or his ethnic or national origins...
>
> ...There will be male Conservatives in East Ham who will be applicants for membership of the East Ham South Conservative Club and who as such will be fully entitled to 'seek to obtain' the facilities which are provided. As between such applicants there must not be discrimination on the grounds of colour, race or ethnic or national origins though there may be selection or election or discrimination in may other ways."

In Gay Alliance Toward Equality v. The Vancouver Sun, released May 22, 1979, the Supreme Court of Canada was concerned with s. 3(1) of the British Columbia Code which reads as follows:

> 3. (1) No person shall
>
> (a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
>
> (b) discriminate against any person or class of persons with respect to any accommodation service, or facility customarily available to the public,
>
> unless reasonable cause exists for such denial or discrimination.

The Vancouver Sun refused to accept for publication an advertisement from the Gay Alliance promoting the sale of subscriptions to its magazine. Mr. Justice Martland, delivering the majority reasons of the Court, said:

> In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, the Sun had adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propagates the views of the Alliance. Such refusal was not based upon any personal characteristic of the person seeking to place that advertisement, but upon the content of the advertisement itself.
>
> Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself. What s. 3 does is to provide that a service which is offered to the public is to be available to all persons seeking to use it and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.

The Queen v. Burnshine, [1975] 1 S.C.R. 693 was concerned with whether s. 150 of the Prisons and Reformatories Act, R.S.C. 1970, c. P-21, by authorizing indefinite sentences for young offenders, infringed their right to equality before the law, which is protected by the Canadian Bill of Rights, R.S.C. 1970, App. III. To answer this question, the Court looked at the purpose of the statute that authorized this apparent inequality of treatment. Martland, J., giving the judgment of the majority of the Court said, at p. 707:

> The Legislative purpose of s. 150 was not to impose harsher punishment upon offenders in British Columbia in a particular age group than upon others. The purpose of the indeterminate sentence was to seek to reform and benefit persons within that younger age group. It was made applicable in British Columbia because that Province was equipped with the necessary institutions and staff for that purpose.
>
> In my opinion, it is not the function of this Court, under the Bill of Rights, to prevent the operation of a federal enactment, designed for this purpose, on the ground that it applies only to one class of persons, or to a particular area.

This case shows, I think, that the Court will not interfere with legislation which distinguishes between classes of persons, or even between persons within a class, if there exists some rational basis for that distinction.

These cases support two propositions that are relevant to any case where there is an alleged violation of the Code: (1) there can be no denial of, or discrimination in respect of, any accommodation, service or facility unless the subject matter of the complaint is within the description and scope of what is made available; (Gay Alliance) and (2) even if there has been a denial of, or discrimination in respect of, an available accommodation, service or facility, there is no offence unless the real reason for the denial or discrimination has been because of the proscribed grounds (Charter).

The first proposition is directed to the extent of the offer -- what is being made available and to whom? There will be no offence committed if the accommodation, service or facility is so described that it incidentally cannot be used by a member of one of the groups mentioned in section 2, or if it is made to a limited class of persons which incidentally excludes one or more of those groups. Thus, in the case of a personal service made available to members of one's own family, the class to whom the offer is extended is dictated by family ties, not by excluding others on the ground of ancestry. And in the case of the boys' choir, the offer of choral training and the right to participate in public performances is made available only to boys who have not yet reached puberty, not because of their sex, but because only boys have the desired vocal qualities. Those services are simply not available to anyone else. Now, manifestly, it is not permissible to describe the accommodation, services or facilities, or restrict the class of persons to whom they are made available, so as to deliberately exclude one or more of the groups mentioned in the section; that would be an attempt to defeat the section by, in effect, violating its provisions. That was the complaint made by counsel of the judgment of the Divisional Court; and the same point was made by the Chief Justice in his dissenting judgment in Gay Alliance, supra. The description of the accommodation, service or facility, and the restriction on the scope of its availability must be for reasons other than those proscribed by the section.

The second proposition goes to the selection of the recipient of the available accommodation, service or facility from amongst those able to take advantage of it. The Code makes it an offence only if the denial or discrimination is because of one of

the proscribed grounds. If there is some other valid and predominant reason, the real reason, it makes no difference that a member of some particular group is in fact excluded. Lord Morris gives many examples in the passage from his judgment that I have quoted earlier.

It is the first proposition that is particularly applicable to the present case. The refusal to permit Debbie Bazso to play on a boys' team was because of the terms of the Constitution, and so it is to the Constitution that one must look to see if there was a breach of section 2 of the Code.

By its Constitution, O.R.S.A. described various series of playoff competitions according to the place of origin of the teams and the age of the players. It recognized that a small municipality is usually not able to field as many good players as a large one and that young boys cannot usually compete successfully against older ones. The series for girls are described in the same way. No doubt there there are occasional anomalies -- one player might be more fairly placed on a team with older players, or a small town might be able to field a better team than a larger town which, nevertheless, has to play in a higher series. But the plain object is to promote general fairness of competition. There was evidence that young girls of the age of 10 or so could compete fairly with boys of the same age. That is not the case with girls who have reached puberty. O.R.S.A. might have said that girls under 11 years of age would be permitted to play on boys' teams, and still achieved its overall objective of fairness in competition. But in that case there would have been discrimination against older players. Where, as here, there is a manifest attempt to achieve fairness in competition amongst teams in the several series and where, to achieve

that end, some discrimination because of sex is inevitable, I do not think it an offence if sex is merely one of the general criteria for dividing players amongst the several series. The real reason for the separation of boys and girls is overall fairness. It is not sufficient to show that in a particular case sex is not a relevant criterion.

I agree, too, with what Judge Meanor of the Superior Court of New Jersey, Appellate Division, said in his dissenting judgment in National Organization for Women, Essex County Chapter, et al. v. Little League Baseball, Inc. (1974), 318 A. 2d. 33 at p. 42:

> Furthermore, I think restriction of Little League to boys has a reasonable basis apart from any impact of the statutory exceptions to sex discrimination. There is a virtual concession in this record that from puberty females cannot successfully compete with males in this contact sport. There may be a few isolated females of exceptional athletic ability who can, but for classification purposes they safely may be ignored. Generally, then, it will be true that females, after reaching adolescence, will be unable to capitalize upon baseball skills acquired during childhood unless they do so in all-female competition which is not now available. Males, on the other hand, may continue in the sport until the approach of middle age and perhaps thereafter. There is nothing unreasonable in the position of Little League in desiring not to teach girls a skill that is only temporarily useful. And although there is no evidence on the point in this record, prima facie one may consider the impact upon the girl who devotes several years to baseball only to find that upon the onset of puberty she can no longer play. In short, it seems to me to be reasonable to have a policy which, considering today's available athletic resources, tends to channel female childhood sports into areas that will provide recreational skills susceptible of long-term enjoyment.

For these reasons I think that the complaints against O.R.S.A. have not been made out, and that the appeal should be dismissed with costs.

J.A.

HOULDEN, J.A.:

I have had the benefit of reading the reasons for judgment of Weatherston and Wilson, JJ.A., and while I agree with Weatherston, J.A. that the appeal should be dismissed, with respect I do not agree with his reasons. I shall, therefore, briefly state my own reasons for dismissing the appeal.

I agree with Wilson, J.A. that the Divisional Court erred in adding the words "to the public" after "available" in s.2(1)(a) of The Ontario Human Rights Code, R.S.O. 1970, c.318, as amended by S.O. 1972, c.119, s.3(1). To add these words would, in my opinion, seriously impair the effectiveness of this important and beneficial social legislation.

I would dismiss the appeal on the simple ground that the activities carried on by O.R.S.A. are not "services or facilities" within the meaning of s.2(1)(a) of the Code. O.R.S.A. has been providing a structured program for softball in rural municipalities of Ontario since 1931. If it was intended to apply the Code to the activities of bodies such as O.R.S.A., I think that the legislation should do so in clear and unequivocal language. I am unable to find such language in s.2(1)(a).

O.R.S.A. is a non-profit, incorporated body, staffed by volunteers. Its annual budget is nominal. O.R.S.A. organizes playoffs for softball teams in the rural areas of Ontario. Teams are divided into categories according to the size of the community, and the age and sex of the participants. There are teams for boys, girls, men and women but no mixed teams. The teams compete in leagues that are affiliated with O.R.S.A. In 1976, some 328 teams participated in playoffs organized by O.R.S.A. Championship teams receive crests and trophies.

O.R.S.A. does not supply the ball park or the baseball equipment. It conducts some coaching clinics and training sessions for umpires, but the payment of umpires' fees is the responsibility of the competing teams. The principal function of O.R.S.A. is the preparation of playoff schedules for the various leagues that are affiliated with it.

In determining the meaning of "services or facilities" in s.2(1)(a) of the Code, I think it is necessary to consider the history of the legislation. Section 2 of the Code is derived from s.2 of The Fair Accommodation Practices Act, 1954, S.O. 1954, c.28. The preamble to that Act read as follows:

> WHEREAS it is public policy in Ontario that places to which the public is customarily admitted be open to all without regard to race, creed, colour, nationality, ancestry or place of origin; whereas it is desirable to enact a measure to promote observance of this principle; and whereas to do so is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

and s.2 provided:

> 2. No person shall deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons.

Section 2 of The Fair Accommodation Practices Act, 1954 was clearly designed to ensure that places to which the public was customarily admitted were free from discriminatory practices based on the grounds specified in the legislation. Even if sex had been one of the grounds specified in the 1954 Act, I think it is clear that s.2 of that Act would not have applied to the activities carried on by O.R.S.A.

Although the preamble to the Code states that the Code is intended to codify and extend the statutes which it

replaced, I do not think that this justifies giving an unlimited meaning to "services or facilities". I think that the words should be restricted to "services or facilities" offered in places such as restaurants, hotels, public parks, and the like.

In the recent decision of Gay Alliance Toward Equality v. The Vancouver Sun and B.C. Human Rights Commission v. The Vancouver Sun (released May 22, 1979, and not yet reported) Martland, J., delivering the judgment of the majority of the Supreme Court of Canada, said with reference to the meaning of the words "accommodation, service or facility" in s.3 of the Human Rights Code of British Columbia Act, S.B.C. 1973 (Second Session), c.119:

> "Accommodation" refers to such matters as accommodation in hotels, inns and motels. "Service" refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. "Facility" refers to such matters as public parks and recreational facilities.

The examples given by Martland, J. are, in my opinion, good illustrations of the situations that are intended to be covered by s.2(1)(a) of the Ontario Code.

Since I do not believe that the structured program offered by O.R.S.A. falls within the words "services or facilities" in s.2(1)(a) of the Code, I would dismiss the appeal with costs.

/ml

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IN THE SUPREME COURT OF ONTARIO

COURT OF APPEAL

Houlden, Wilson and Weatherston, JJ.A.

B E T W E E N :

ONTARIO HUMAN RIGHTS COMMISSION and BRETT BANNERMAN

Appellants

- and -

ONTARIO RURAL SOFTBALL ASSOCIATION

Respondent

J U D G M E N T

Released:

August 30, 1979